In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE. } No. 148.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

This suit was instituted by the United States against C. C. McCoy, as principal, and David W. Small, William O'Donnell, and Thomas Mosgrove, as bondsmen, to recover the sum of $5,772.99, and interest, alleged to be the amount of actual damages sustained by the United States by reason of the failure of McCoy to perform a contract made and entered into by him with the United States for the transportation of the United States mail on route No. 76475 in the city of San Francisco.

The facts in this case are substantially as follows: In the month of January, 1890, the defendant in error, C. C. McCoy, and his codefendants as sureties on his

bond, entered into a contract with the United States for the transportation of mail in the city of San Francisco, Cal. Under this contract McCoy was to furnish certain equipment for carrying the mails and to perform certain service described in the advertisement of the Postmaster-General of September 16, 1889, inviting proposals for such service, and to perform all new or additional service of the same character which might at any time during the term of said contract be required in said city, for the sum of $7,700 per year. The term of the contract extended from July 1, 1890, to June 30, 1894, a period of four years. McCoy proceeded with his undertaking, being permitted by the Postmaster-General to sublet the said contract on two different occasions, first, to A. W. Branner, for the sum of $7,500 per annum, and second, on the 1st day of December, 1890, to N. Wines, for the sum of $9,900 per annum. From November 10, 1890, the Postmaster-General required the contractor to perform additional service without additional compensation, in accordance with the terms of the contract. From February 16, 1891, a further service was required; and from October 1, 1891, still further service. It is alleged that on the 8th day of May, 1893, the said McCoy and the said subcontractors abandoned the said contract, and failed and refused to perform the same; that on the following day said McCoy was notified by the Post-Office Department that unless he should promptly put the service into operation he would be declared a failing contractor; that the service would be relet at his expense, and that his sureties would be held subject to

the penalties of law; also, that the postmaster at San Francisco had been authorized to employ temporary service pending the resumption of service of the said contractor, at the rate of $17,500 per annum; and on May 17, 1893, said McCoy having failed to perform the service on route No. 76475, an order was made by the Second Assistant Postmaster-General declaring the said C. C. McCoy a failing contractor. It is further alleged that, by reason of this failure of the said McCoy to carry the mails as agreed, the Government was compelled to procure temporary service from May 5 to August 13, 1893, for which service the amount of $4,827.77 was paid; that in addition to this amount the said McCoy was fined $5 for failure to perform the agreed service during the third quarter of the year 1893. A contract was awarded to one Max Popper, of San Francisco, for the performance of the service during the remainder of the term, namely, from August 14, 1893, to June 30, 1894, at the rate of $12,000 per annum, this being the lowest bid obtainable; and in accordance therewith the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do. The difference between the amount of the contract to McCoy and that to Popper for the specified time is $3,785.87, which is claimed to be chargeable to the defendants in error. As an offset to the claims, credit is given for the amount the said McCoy would have been entitled to receive had he complied with his contract to the end of the term—to wit, $2,845.65—leaving a remainder of $5,772.99, the actual damage claimed

by the plaintiff by reason of the failure of McCoy to perform said contract. The defendants entered a general denial to the allegations of the complaint. Upon the trial of the case the Government introduced in evidence certain documents, as follows: (1) A certified copy from the records in the Auditor's office of the Post-Office Department of the account of C. C. McCoy, as failing contractor, for amount of actual damage to the United States; (2) certified copy of postmaster at Walla Walla, Wash., to the Auditor, that said postmaster had made demand on C. C. McCoy and upon two of his sureties for payment of $30,000; (3) a certified copy of account for amount of bond of C. C. McCoy, failing contractor; copy of proposals and advertisements to bidders for mail transportation service; (4) copy of contract and bond entered into by the defendants in error with relation to the transportation of mails on route No. 76475; (5) recognitions by the Postmaster-General of subcontracts for the service under this contract; (6) requirements of Postmaster-General for additional service by contractor; (7) two telegrams from the postmaster at San Francisco to Department at Washington, D. C., regarding abandonment of service by McCoy; (8) communications to the defendants from Post-Office Department regarding failing contract; (9) orders of Postmaster-General declaring McCoy a failing contractor and recognizing contracts for temporary service with J. N. Gorman, and for service for balance of term with Max Popper; (10) contract and bond of Max Popper for this service

to completion of term. No other evidence was offered on behalf of the Government, and its case rested entirely upon such documentary evidence.

Upon the first trial before the circuit court of the United States for the district of Washington, southern division, the court ordered judgment in favor of the defendants in error, "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case." (Record, p. 10.) The Government took the case, on writ of error, to the circuit court of appeals for the ninth circuit, and that court reversed the judgment of the court below, holding that under the evidence submitted the Government was entitled to a verdict and judgment for the sum of $5, being the amount of a fine imposed by the Postmaster-General upon the contractor for a delay of sixteen hours on July 5, 1893, in dispatching 11 pouches of mail for the S. F. & S. C. R. P. O. (Record, p. 15, 16; 104, Fed., 669.)

The case was remanded and again tried before the circuit court of the United States for the district of Washington on the 9th day of May, 1901, and the Government introduced upon that trial identically the same documentary evidence which it offered upon the first trial of the case, a motion for a continuance by the Government on account of the absence of a material witness, to wit, the postmaster at San Francisco, having been denied by the court. The defendants offered no evidence. The court thereupon instructed the jury to return a verdict in favor of the plaintiff in error for the sum of $5, holding that the testimony

offered on behalf of the Government was legally insufficient to make out a prima facie case for damages. (Record, p 16.) The case was thereafter carried to the circuit court of appeals for the ninth circuit by writ of error, and that court, on the 3d day of March, 1902, affirmed the judgment of the circuit court (record, p. 65), and the case is here on writ of error for the purpose of reviewing that judgment.

SPECIFICATION OF ERRORS.

The eight assignments of error (record pp. 67, 68, and 69) raise but one question, namely, that the circuit court of appeals for the ninth circuit in its judgment and mandate made and entered on the 7th day of April, 1902, and in its opinion rendered and filed therewith, erred in holding that the certified copy from the records in the Auditor's office for the Post-office Department of the account of C. C. McCoy as failing contractor for the amount of actual damage to the United States (record p. 25); the two telegrams of May 3, and May 8, 1893, from the postmaster at San Francisco to the Department at Washington, D. C., regarding the abandonment of the service by McCoy (record pp. 48 and 49); the letter of the Second Assistant Postmaster-General, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary service for the route (record p. 50); and the order of the Postmaster-General, dated May 18, 1893, declaring that McCoy had failed to perform the service and was a failing contractor (record p. 50), were all legally insufficient to establish a *prima facie* case against McCoy

and his sureties for damages by reason of the failure of McCoy to perform his contract with the Government.

THE LAW.

The following are the various provisions of the United States Statutes which are relied upon by the Government as authorizing the introduction of the documentary evidence offered by the Government in this case, and making such documents *prima facie* evidence of the facts therein recited. (The italics are mine.)

Section 882, Revised Statutes:

> Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof.

Section 889, Revised Statutes:

> Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account books of the Post-Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States in civil suits and criminal prosecutions; *and in any civil suit, in case of "delinquency" of any postmaster or "contractor," a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.*

Section 3849, Revised Statutes:

> *Every postmaster shall promptly report to the Postmaster-General every delinquency, neglect, or malpractice of the contractors*, their agents or carriers, which comes to his knowledge.

Section 3962, Revised Statutes:

> The Postmaster-General may make deductions from the pay of contractors for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

Act June 8, 1872, chapter 335, sections 245–247 (as amended 1874, 1876) (17 Stats., 313; 18 Stats., 235):

> SEC. 245. * * * and in case of failure of any bidder to enter into such contract to perform the service, *or, having executed a contract, in case of failure to perform the service according to his contract, he and his sureties shall be liable for the amount of said bond as "liquidated damages," to be recovered in an "action of debt" on the said bond.* * * *

Act June 8, 1872, chapter 335, section 251 (as amended 1874, 1876) (17 Stats., 314; 18 Stats., 235):

> * * * Whenever an accepted bidder shall fail to enter into contract, *or a contractor on any mail route shall fail or refuse to perform the service on said route according to his contract*, or when a new route shall be established or new service

required, or when, from any other cause, there shall not be a contractor legally bound or required to perform such service, *the Postmaster-General may make a temporary contract for carrying the mail on such route, without advertisement, for such period as may be necessary, not in any case exceeding six months, until the service shall have commenced under a contract made according to law.* * * *

Act August 3, 1882, chapter 379, section 2 (22 Stats., 216):

SEC. 2. Whenever a contractor for postal service fails to commence proper service under the contract, or, *having commenced service, fails to continue in the proper performance thereof, the Postmaster-General may employ temporary service on the route,* at a rate of pay per annum not to exceed the amount of the bond required to accompany proposals for service on such route, as specified in the advertisement of the route, or at not exceeding pro rata of such bond, in cases where service shall have been ordered to be increased, reduced, curtailed, or changed, subsequent to the execution of the contract; *the cost of such temporary service to be charged to the contractor, and to continue until the contractor commences or resumes the proper performance of service,* or until the route can be relet, as now provided by law, and service commenced under the new award of contract. All acts or parts of acts inconsistent with the provisions of this act being hereby repealed.

QUESTIONS OF LAW.

There are two questions of law presented by the record in this case, which are as follows:

First. Was the certified copy from the record in the Auditor's Office of the Post-Office Department of the account of C. C. McCoy, as failing contractor for amount of actual damage to the United States, together with the certified copies of certain other records of the Post-Office Department, upon which said account was based, and the orders of the Postmaster-General declaring McCoy a failing contractor, and recognizing contracts for temporary services and for services for the balance of the term, legally sufficient to establish the fact alleged in the sixth paragraph of the Government's complaint, that McCoy failed and refused to comply with the terms of his contract? (Pages 25 to 58 of the record.)

Second. Whether, under the peculiar provisions contained in the contract between McCoy and the Government, which permitted the Postmaster-General to annul the contract for repeated failures, and stipulated that such annulment should not impair the right of the United States to claim damages from said contractor and his sureties under the contract, and further that such damages may for the purpose of *set-off* or *counterclaim* in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor for the Treasury for the Post-Office Department, did not have the legal

effect of dispensing with positive proof of the *breach* of the contract and entitle the United States to maintain this action as an action of debt upon the showing made that the contract was, in effect, annulled by the Postmaster-General for repeated failures. (Rec., p. 45.)

ARGUMENT, AND POINTS AND AUTHORITIES.

I.

The documentary evidence introduced by the Government was legally sufficient to make out a prima facie case.

The circuit court of appeals for the ninth circuit, in affirming the judgment of the trial court, held that the evidence submitted on behalf of the Government was legally insufficient to make out a *prima facie* case. Judge Morrow, in delivering the opinion of that court on the first appeal (Record, p. 15, 114 Fed., 669), said:

> A material allegation of the complaint was "that on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract and did fail and refuse to perform the same." * * * The statement of McCoy's account by the Auditor of the Post-Office Department; the telegram of the postmaster at San Francisco to the Second Assistant Postmaster-General, dated May 8, 1893, stating that the contract had been abandoned; the letter of the Second Assistant Postmaster-General, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary

service for the route; the certificate of the Postmaster-General, dated May 18, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned the performance of his contract. * * * The court was, therefore, right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract.

The contention of the Government is that the two telegrams sent by the postmaster at San Francisco to the Postmaster-General, announcing the fact that McCoy had failed and refused to perform his contract with the Government, were admissible in evidence for the purpose of proving such fact upon the theory that they were reports from a public officer which were expressly required by statute.

In order to establish a *prima facie* case against the defendants for a breach of this contract with the Government by reason of their failure to perform, it was only necessary for the Government to introduce some evidence, however slight, legally competent to prove the fact at issue. We maintain that the evidence offered by the Government, in the absence of any evidence to the contrary, was sufficient to overcome the general denial contained in the answer.

Section 3849, Revised Statutes, provides that: "Every postmaster shall promptly report to the Postmaster-General every delinquency, neglect, or mal-

practice of the contractors, their agents or carriers, which comes to his knowledge."

Under this express requirement of the law the postmaster at San Francisco reported to the Postmaster-General, in two telegrams, that McCoy had neglected, failed, and absolutely abandoned the performance of his contract with the Government. These telegrams contained official information, and were sent in pursuance of an express duty imposed upon the postmaster by the statute above mentioned. Certified copies of these telegrams were introduced in evidence upon the trial (record, pp. 48–49). These telegrams were as follows:

[Telegram.]

SAN FRANCISCO, CAL., *May 3, 1893.*

Hon. J. LOWRIE BELL,

Second Assistant Postmaster General,

Washington, D. C.

H. Floyd, of this city, has secured judgment against C. C. McCoy, contractor, route seventy-six four seventy-five, San Francisco regulation-wagon service, for $4,300. Outfit will be sold by sheriff to satisfy judgment on May 5. No other regulation wagons are available, and contractor will probably be unable to perform service in present wagons. Is this a mail-messenger service or a star route? Instruct me what arrangements to make for temporary service, if necessary.

SAMUEL M. BACKUS,

Postmaster.

[Telegram.]

SAN FRANCISCO, CAL., *May 8, 1893.*

SECOND ASSISTANT P. M. GENERAL,

Washington, D. C.

Service absolutely abandoned this date. Have arranged with Gorman for temporary service in regulation wagons at rate of seventeen thousand five hundred per annum, dating from May 5. Department has privilege to terminate at any day. Particulars mailed.

BACKUS, *Postmaster.*

The contractor and his sureties were thereupon immediately notified by letter or telegram (record, pp. 49 and 50), that unless service under the contract was immediately resumed the Postmaster-General would declare McCoy a failing contractor and re-let the service at his expense and hold him and his sureties to the penalties prescribed by law.

One of the sureties subsequently replied to the Postmaster-General that it would be impossible for the sureties to perform McCoy's wagon service at San Francisco (record, p. 50).

On the 18th day of May, 1893, the Postmaster-General, having before him this official information with reference to the failure of McCoy to perform his contract, officially recorded the fact of the neglect and failure of McCoy to perform his contract, as reported to him by the postmaster at San Francisco, in the following order or declaration (record, p. 50):

State of California. No. 76475.

Regulation wagon service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.

Whereas C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service, he is hereby declared a failing contractor.

W. S. BISSELL,
Postmaster-General.

Date, May 18, 1893.

Greenleaf on Evidence, section 483:

Official registers. The next class of public writings to be considered consists of *official registers*, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons on whose authority the truth of the documents depends. The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents appointed for the purpose; but partly also on the publicity

of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the State, and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth. Besides this, it would always be difficult, and often impossible, to prove facts of a public nature by means of actual witnesses upon oath.

Greenleaf on Evidence, section 493:

Official registers.—In regard to *official registers*, we have already stated the principles on which these books are entitled to credit; to which it is only necessary to add, that where the books possess all the requisites there mentioned, they are admissible as competent evidence of the *facts they contain.* But it is to be remembered that they are not, in general, evidence of any facts not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, a parish register is evidence only of the time of the marriage, and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry.

See, also, Taylor on Evidence, vol. 3, section 1591.

Wharton on Evidence, vol. 1, section 639:

Nonjudicial registries and records. Where a statute requires the keeping of an official record for the public use, by an officer duly appointed for the purpose, and subject not merely to private suit, but to official prosecution for errors therein, such record, so far as concerns entries made in it in the course of business, is admissible in evidence as *prima facie* proof of the facts it contains. Nor is it necessary to verify such record by the oath of the person keeping it. That it is directed by statute to be kept for the public benefit, and that it is kept, so far as appears on its face, with regularity and accuracy, entitles it to be received in evidence, and throws the burden of impeaching it on the opposite side. To make the record itself evidence, it is only necessary that it should be produced, and that it should be proved to have come from the proper depositary. Thus, under this rule, the English courts have admitted custom-house registries and official papers; the public registries of municipal and similar corporations; the registries of parliamentary voters which are in the proper public custody; the registries of the coast guard noting changes of wind and weather, and light-house journals for the same purpose. So also land-tax assessments have been held admissible to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and in Ireland poor-law valuations have been received as evidence of value. So the courts have ad-

> mitted the books of the Sick and Hurt Office to prove the death of a seaman and the time of such death; and the registries of public prisons, or penitentiaries, to prove the stay of a prisoner, though not to prove the cause of the commitment.

Wharton on Evidence, vol. 1, section 640:

> In this country we have numerous cases tending to show that official records, duly kept by public administrative officers, are, as to third parties, *prima facie* evidence of the facts entered duly by such officers in the course of their duties, as well as of documents recorded. Even a public officer's entry, when in the regular discharge of his duties, in a book he is by law required to keep, is *prima facie* evidence in his own favor when the performance of the acts registered is at issue.

It will be observed that section 3849, of the Revised Statutes, expressly made it the duty of the postmaster at San Francisco to promptly report to the Postmaster-General the failure on the part of McCoy to perform his contract with the Government; that McCoy was engaged in carrying the mails to and from the post-office in the city of San Francisco, of which office such postmaster had direct and immediate charge. If any official connected with the Government had actual knowledge of such failure on the part of McCoy to perform his contract, it was certainly the postmaster at San Francisco. His report to the Postmaster General was made under and pursuant to this express statute, which required the postmaster to write down and re-

port this particular fact which not only occurred in the course of his public duty but came under his personal observation.

The Government's contention is, that inasmuch as the law directly and specifically imposed the duty upon the postmaster at San Francisco to promptly report to the Postmaster-General the delinquency, neglect, and failure of McCoy to perform his contract with the Government, that such official report should be considered *prima facie* evidence, at least, of the fact that McCoy had failed and neglected to perform his contract. It is upon such official information that the Postmaster-General is required to act under the law and relet the contract, and hold the failing contractor and his sureties to respond in damages for whatever amount the Government might sustain by reason of such failure. Upon the receipt of this official information from the postmaster at San Francisco the Postmaster-General had official and legal knowledge of the failure of the contractor to perform his contract, and the Postmaster-General's order and official declaration regarding such fact in the office of the Post-Office Department is additional *prima facie* evidence that the contractor had failed. (See *United States* v. *Carr*, 132 U. S., 644, 653.)

Evanston v. Gunn (99 U. S., 660).

This was an action of trespass on the case brought by Jessie Gunn against the village of Evanston, Ill., to recover damages which she had sustained April 22, 1873, by reason of the alleged neglect of duty on the part of the defendant.

The plaintiff, for the purpose of showing the direction and velocity of the wind and the falling of snow on the morning in question and the previous evening, offered in evidence the record made by a person employed at Chicago by the United States Signal Service. The defendant objected because there was no law authorizing the record to be used in evidence, and because the same was not competent testimony. The court overruled the objection, and the defendant excepted.

Mr. Justice Strong, in delivering the opinion of the court, said (p. 665):

> The admission in evidence of a record kept by a person employed by the United States Signal Service at Chicago was objected to at the trial, not because it had not been properly made, identified, and proved, but for the alleged reason that "there was no law authorizing such records to be used in evidence, and because it was not competent testimony." The defendants thus having specified their objection, it must be considered that all others were waived, or that there was no ground upon which others could stand. (*Berks & Dauphin Turnpike Co.* v. *Myers*, 6 Serg. & R. (Pa.) 12; *Chicago & Alton Railroad Co.* v. *Morgan*, 69 Ill., 492.) We have then only to consider the objections that were made—the only ones that appear in the bill of exceptions—and they present the question whether the record conceding it to be properly proved was competent evidence. It may be admitted there is no statute expressly authorizing the admission of

such a record, as proof of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the continent and at other points in the States and Territories for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the Chief Signal Officer of the Army, for such stations, reports, and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these acts a system has been established, and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence "official registers or records kept by persons in public

office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation." (Taylor, Evid., sec. 1429; 1 Greenl. Evid., sec. 483.) To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. (1 Greenl. Evid., sec. 496.) Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him. (*Galt* v. *Galloway*, 4 Pet., 332.) It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned: *De Armond* v. *Nesmith*, 32 Mich., 231; *Gurney* v. *House*, 9 Gray (Mass.), 404; *The Catharine Maria*, Law. Rep., 1 Ad. and Ec., 53; *Clicquot's Champagne*, 3 Wall., 114. We think, therefore, that there was no error in admitting the record kept by the person employed for the purpose by the United States Signal Service.

In the case at bar we have, however, an express statute requiring the postmaster at San Francisco to report to the Postmaster-General every delinquency, neglect, or malpractice of a contractor which comes to his knowledge. The mere fact that under the peculiar circumstances of this case such report recorded one isolated fact, while the report or record of a Signal Service officer recorded many facts as they occurred from day to day, can not be regarded as affecting the principle involved. These two telegrams from the

postmaster at San Francisco to the Postmaster-General, which were received in evidence, were not mere private entries or memoranda. They had been made by a person whose public duty it was to record truly the facts therein stated; they were of a public character, made and reported for public purposes; and while these telegrams were nothing more than *official reports*, the fact that an express statute of the United States required such *reports* to be made to the Postmaster-General would seem upon principle, at least, to bring such *reports* within the rule which admits in evidence "official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, or under their personal observation."

In the case of *Evanston* v. *Gunn* (*supra*) the ultimate fact to be established was the condition of the weather upon a certain day, and the report of the officer whose duty it was to record such fact was held to be competent evidence to establish such fact. In the case at bar the ultimate fact to be proven is that McCoy failed and neglected to carry the mails to and from the post-office at San Francisco as required by his contract. The law required the postmaster at San Francisco to report that fact to the Postmaster-General. Such report was made in the form of two telegrams, which were filed in the office of the Postmaster-General. Our contention is that these reports were competent to establish *prima facie* such failure.

Bingham v. Cabot (3 Dallas, 19).

In this case it was held that certified copies, under the hand and seal of the Secretary of State, of letters of a public agent resident abroad, and of the official order of a foreign colonial governor, concerning the sale and disposal of a cargo of merchandise, were admissible in evidence for the purpose of proving the transactions therein recorded.

Mr. Justice Paterson said (p. 38):

> I am clearly of opinion that the certificate of the Marquis de Bouille, registered in the Admiralty of Martinique, ought to have been admitted as evidence, upon the trial of this cause. He was governor of the island, possessing a high executive and superintending control, and we must presume that he acted, on this occasion, with legitimate authority.
>
> Those letters which were written to Congress by Mr. Bingham at the time of the transaction should likewise, in my opinion, have been submitted to the jury. On the arrival of the captured vessel the governor might have awarded absolute restitution; but choosing to adopt a middle course, he directed the cargo to be sold and the proceeds to remain in the hands of Mr. Bingham, as the agent of Congress, until Congress should instruct him how to act. In the character of a public agent, therefore, Mr. Bingham received the property; and his contemporaneous correspondence on the subject in that character with the American Government was certainly proper evidence to show the original nature and complexion of the facts in

controversy. I have more doubts on the admissibility of the other letters referred to in the bill of exceptions; but in relation to them it is unnecessary to give a decided opinion.

II.

The certified copy of the records in the Auditor's office of the Post-Office Department of the account of C. C. McCoy, as failing contractor, for the amount of actual damages sustained by the United States, taken in connection with the other testimony offered, is prima facie evidence not only of the fact and the amount of the indebtedness, but also of the time when and the manner in which it arose.

The following provisions of law are specifically relied upon by the Government in support of this proposition:

Section 882, Revised Statutes:

> Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with originals thereof.

Section 889, Revised Statutes:

> * * * and in any civil suit, *in case of delinquency* of any postmaster or *contractor*, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

Soule v. United States (100 U. S., 8).

This was an action by the United States on the bond executed by Soule as collector of internal revenue for the first collection district of the State of California, and his sureties, bearing date January 12, 1867, and conditioned according to law. There was a judgment in favor of the United States. It was claimed by the plaintiff in error that the court erred in admitting in evidence the transcript of accounts as audited by the Fifth Auditor.

Mr. Justice Clifford, in delivering the opinion of the court, said (p. 11):

> When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register and authenticated under the seal of the Department, * * * shall be submitted as evidence; and the court trying the cause shall be authorized to grant judgment and award execution accordingly. (Rev. Stat., sec. 886; *Bruce* v. *United States*, 17 How., 439; *Smith* v. *United States*, 5 Pet., 292; *Cox* v. *United States*, 6 id., 172; *Hoyt* v. *United States*, 10 How., 109.)

United States v. Stone (106 U. S., 525, 530).

This was a suit by the United States against the principal and his sureties upon an official bond as collector of internal revenue for the third district of Mississippi. The breach alleged was that he failed to account for and pay over the sum of $57,497.84 of the

public moneys which had come into his possession as such collector. The defendant filed several different pleas, among which was one traversing the alleged breach of the condition of the bond. There was a verdict in favor of the United States for $10,003.52. Both parties brought the case up on writs of error to reverse that judgment. One of the questions presented in the record was whether the transcript from the books of the Treasury Department at Washington, and of papers on file in the Department, were competent evidence of the matters therein set forth.

Mr. Justice Matthews, in delivering the opinion of the court, said (p. 530):

> And the separate adjustment of his accounts for both periods, made at the Treasury Department upon its books, is *prima facie* evidence, *not only of the fact and of the amount of the indebtedness, but also of the time when, and the manner in which, it arose.* It is, of course, always open to the defendants sought to be charged, to show by opposing proof, that the default charged occurred before the commencement of their liability.

United States v. Dumas (149 U. S., 278, 285).

This was an action brought by the United States to recover from Anna M. Dumas, and the sureties on her official bond, money alleged to have been illegally retained by her while postmaster at Covington, St. Tammany Parish, La. At the trial of the case in the court below the issue before the jury was whether Anna M. Dumas, as postmaster, did collect and receive in her

official capacity, from October 1, 1883, to August 3, 1885, in excess of the compensation fixed and allowed her in the order of the Postmaster-General, above all proper expenditures, the sum of $709.89. On this issue the plaintiffs in error requested the court to give the jury a certain instruction, which the court refused, and charged the jury in regard to the order (No. 161) of the Postmaster-General, as follows: "This order was in its nature provisional. The adjustment is only *prima facie* evidence that the account is as stated therein."

Mr. Justice Jackson, in delivering the opinion of the court in that case, said (p. 285):

> We think this contention of the Government can not be sustained, and that the ruling of the circuit court on the question was correct.
>
> As to the competency, merely, of this evidence there can be no question, for it is provided by section 889, Revised Statutes, that "in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."
>
> The force and effect of such testimony has been several times considered by this court. Thus in *United States* v. *Eckford's Executors* (1 How., 250), a statement of account by the officers of the Treasury was held not to be conclusive, but only prima facie evidence. So, in

United States v. *Hodge* (13 How., 478), a Treasury transcript offered in evidence was held to be competent, but not conclusive. In *Watkins* v. *United States* (9 Wall., 759), nothing more appeared in the shape of evidence than the certified transcript of accounts, and being held to be prima facie evidence, it warranted judgment for the Government for the amount therein shown to be due, in the absence of any testimony explaining or contradicting it. But that case does not hold that certified transcripts of accounts are conclusive upon the officer. So, in *Soule* v. *United States* (100 U. S., 8, 11), it was held that "Treasury settlements of the kind are only *prima facie* evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account."

In the same line it has been held by this court that the adjustment of accounts made by the auditor is *prima facie* evidence, not only of the fact and the amount of the indebtedness, but also of the time when, and the manner in which, it arose; and that an objection to the statement does not lie to its competency, but to its effect. (*United States* v. *Stone*, 106 U. S., 525.)

And again, Mr. Justice Jackson, in the *Dumas case* (149 U. S., 286), said:

> The single question raised and presented by the plaintiffs in error was, whether the order of the Postmaster-General, in connection with the certified statement of account, was final and conclusive on the defendants in error. We hold that it was merely evidence which, unexplained or uncontradicted, would have warranted a judgment in favor of the plaintiffs in error for the balance shown thereby to be due. But this evidence did not conclude the defendants, and for aught that appears from the record they may have explained or contradicted the statement, or shown it to be incorrect; and as it does not appear what the evidence was on this subject, we are unable to say that the judgment was wrong, there being no error in the charge of the court. * * *
>
> Our conclusion is that the order of the Postmaster-General and the certified accounts produced by the Government in the present case were only *prima facie* evidence of the balance claimed against the defendants in error, and that there was no error in the court below in so holding; and the judgment is accordingly affirmed.

In that case it was held that the statement of the account certified by the Auditor, taken in connection with the order of the Postmaster-General, was sufficient to make out a *prima facie* case against the defendant and her sureties on her official bond. In order to maintain the suit it was necessary for the

Government to show a failure on the part of the principal to faithfully perform her duties as postmaster. It was alleged that this failure consisted in illegally retaining from the Government the sum of $709.89 in excess of her commissions for the period from October 1, 1883, to August 3, 1885. The law (act of June 17, 1878, 20 Stats., 140, 141) authorized the Postmaster-General, when satisfied that a postmaster had made false returns of the business, to withhold commissions on such returns. The Postmaster-General was therefore authorized to determine, in the first instance, the fact that false returns were made, and while such determination would not be conclusive evidence that such false returns were made as a matter of fact, it was held to be *prima facie* evidence of such fact.

CERTAIN FEDERAL CASES RELIED UPON BY DEFENDANTS IN ERROR CONSIDERED AND DISTINGUISHED.

United States v. Case et al. (49 Fed., 270).

This was an action by the United States against Riley W. Case on his bond as postmaster to recover an alleged deficit in his accounts. The plaintiff to prove this case depended solely upon statements of account made by the officials of the Post-Office Department and certified as required by law. It was contended on behalf of the plaintiff that these statements were sufficient to establish liability under sections 886 and 889, of the Revised Statutes, and the act of June 17, 1878. (20 Stats., 140, 141.) A verdict was ordered for the plaintiff, which was thereafter set aside and a new trial granted.

The court said:

> The accounts offered in evidence by the plaintiff bring the defendants into debt, because the officials of the Post-Office Department have charged the defendants in gross with "commissions illegally claimed" and "property illegally retained," without a word of proof, so far as the accounts show, to sustain the charges. These officials have tried the question at issue between the Department and the postmaster, found him guilty of malfeasance, assessed the damages against him, and certified their findings. The evidence, if there was any, on which these findings are based has not been returned. There is nothing to show what the property was that the postmaster is accused of retaining improperly, or its value, or the reasons which induced the officials of the Department to make the charges relating thereto. The account does not show why the commissions are illegal. It contains nothing but the unsupported decree of condemnation.

It is very evident that the case of the *United States* v. *Case* differs very materially from the case at bar. In this case the Post-Office Department had been advised through the proper official channels that McCoy had failed to perform his contract, and the Postmaster-General thereupon issued an order declaring him a failing contractor and let the contract to another party, as was his duty under the law. The records upon which this action of the Postmaster-General was based were offered in evidence. The certified copy from the

records of the Auditor's office of the Post-Office Department in account with McCoy as a failing contractor, show specifically the amount of McCoy's indebtedness to the United States, and the reasons which induced the officials of the Department to make the charges therein stated. The record not only shows the finding that McCoy had failed to perform his contract, but every act of the officials of the Department going to support such finding, and all the items of the account with McCoy from which the Auditor deduced the statements, show that McCoy was indebted to the United States in the sum of $5,772.99.

United States v. Forsythe (25 Fed. Cases, No. 15133). In this case the court said:

> The transcript being offered in evidence was objected to on the ground that the items were not set down from the returns of the defendant, but were returned by his successor from talking with the persons who had paid duties into the office. The Treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items of which a considerable part of it is composed, though put into the transcript, are not evidence. *They were not ascertained and established by the ordinary official action of the Department, and consequently they are not evidence.* Many of the items were put down by an estimate, and others had no better proof of their verity than hearsay, which is not admissible.

But such an objection can not be urged with reference to the facts certified to in the case at bar. All the facts here recorded were facts which were ascertained and established by the ordinary official action of the Department, and consequently are prima facie evidence, not only of the facts certified to and the amount of the indebtedness, but also of the time when, and the manner in which, it arose.

United States v. Buford (3 Pet., 10, 28).

This case was one in which the Government brought suit against the defendant on a Treasury statement made upon a receipt given to an officer named Morrison. Mr. Justice McClean, in delivering the opinion of the court, said:

> An account stated in the Treasury Department *which does not arise in the ordinary mode of doing business in that Department* can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. But where the moneys come into the hands of an individual, as in the case under consideration, the books of the Treasury do not exhibit the facts, nor can they be officially known to the officers of the Department. In this case, therefore, the claim must be established, not by the Treasury statement, but by the evidence on which that statement was made.

It will be noticed that in that case the ultimate fact to be proven was the fact that certain moneys had come into the hands of a certain individual. There was no law which made it the duty of an officer of the Treasury Department to ascertain that fact. Neither was that fact so intimately connected with a matter before the Treasury Department, officially, as to make it the official duty of an officer of that Department to ascertain such fact. In the case at bar, however, it was the official duty of the postmaster at San Francisco and of the Postmaster-General to ascertain whether the contractor, McCoy, had failed to perform his contract. They did ascertain this fact through the official channels of that Department, and thereafter the Postmaster-General duly recorded such fact in a proper order and subsequently acted upon such official information by entering into another contract with a different party for the performance of these selfsame services. These facts were consequently officially before the Auditor, and his account showing the indebtedness of McCoy to the United States was properly based upon such official information.

United States v. Smith et al. (35 Fed. Rep., 490).

This was an action on a bond given by the defendants to secure the faithful performance by A. R. Smith of his duties as special Indian agent under an appointment made in October, 1881. The breaches assigned were that Smith failed to account for $497.15 of public moneys intrusted to him for disbursement, and that he failed to account for public property that came into

his possession of the value of $1,777.03. The testimony on the part of the Government was contained in a Treasury transcript certified by the Register and Secretary of the Treasury pursuant to section 886 of the Revised Statutes of the United States. The court said:

> Among the various papers forming the transcript is a statement purporting to be a copy of Smith's consolidated account as borne on the books of the Treasury Department. On the debit side of the account he is charged with the sum of $1,777.03 for Government property received at the Western Shoshone Agency and not properly accounted for. The transcript of the consolidated account *does not show of what the property consisted, nor the manner in which the value of same was ascertained.* * * * Respecting this latter paper, it should also be said that it does not profess to be a transcript from any book kept, or a copy of any document on file, in the Treasury Department. * * * But a transcript from a book which merely shows *a charge in gross* against an officer for the value of public property, without describing the property, or the method of valuation, or the manner in which it came to his hands, or the disposition made of the same, is of no value even under section 886.

The account referred to in that case is substantially different from the account in the case at bar. It can hardly be said that the gross charge, such as the one made in that case, which neither discloses the items of

which it was composed nor the value, was in any sense an account such as is contemplated by sections 886, 889 of the Revised Statutes, and no such objection can be urged against the statement of account in this case, which is as follows:

Certificate to account for amount of actual damage.

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE
POST-OFFICE DEPARTMENT,
June, 1 1895.

I, Geo. A. Howard, Auditor of the Post-Office Department, do hereby certify the annexed to be a true and correct statement from the records of this office of the account, for amount of actual damage to the United States, of C. C. McCoy, failing contractor, on route No. 76475, in the State of California, pertaining to his accounts in the office of the Auditor for the Post-Office Department.

In testimony whereof I have hereunto signed my name and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

GEORGE A. HOWARD,
Auditor for the Post-Office Department.

STATEMENT OF ACCOUNT FOR AMOUNT OF ACTUAL DAMAGE.

DR. *C. C. McCoy (Cal.), failing contractor, in account with the U. S.* CR.

Route.			Route.		
76475	To amount paid J. M. Gorman for temporary service from May 5 to August 13, 1883	$4,827.77	76475	By transportation from April 1 to August 13, 1893 ..	$2,845.65
"	To amount of fine, 3d quarter, 1893.	5.00		By balance	5,772.99
"	To difference between his contract at $7,700.00 and the contract of Max Popper, at $12,000.00 per annum, from August 14, 1893, to June 30, 1894.	3,785.87			
		$8,618.64			$8,618.64
	To balance.....	$5,772.99			

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT,
Washington, D. C., June 1, 1895.
GEORGE A. HOWARD, *Auditor.*

United States v. Jones (8 Pet., 375).

This was an action of debt brought by the United States against Benjamin G. Orr, on a bond, joint and several, executed by said Orr, Alexander McCormick, and William O'Neale, to the United States, in the penal sum of $60,000. The bond was given for the faithful performance of a contract entered into by Orr with the Acting Secretary for the War Department to supply and issue certain rations for the use of the United States at such places as troops should be stationed within the limits of the Mississippi territory, the State of Louisiana, and their vicinity, north of the Gulf of

Mexico. The defendant, Orr, having died after the institution of the suit, it was proceeded in against Walter Jones, his administrator *de bonis non*, who made defense in the action, and after *oyer* of the bond and condition and the contract, pleaded performance. The plaintiffs replied that Orr did not perform the contract entered into by him. The case was tried and verdict and judgment rendered in favor of the defendants.

The court said:

> *The officers of the Treasury Department may well certify facts which come under their official notice*, but they can not certify that which does not come within their own knowledge. In the case of the *United States* v. *Buford* (3 Pet., 12), the court say that "An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that Department, can derive no additional validity from being certified under the act of Congress. Such statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department, where the transactions are shown by its books." The issuing of the warrants to Orr was an official act, in the ordinary mode of doing business in the Department, and the fact is proved by being certified as the act of the Congress requires. But the execution of bills of exchange and orders for money on the Treasury, though they may be connected with the settlement of an account, *can not be officially known to the accounting officers.* * * *

The foregoing cases would seem to sustain the following propositions:

First. That where an official record contains an assertion of some fact which it is the duty of the officer to ascertain and record, whether such duty be imposed by statute or required to be performed by the nature of his office, that such record is admissible in evidence as competent proof of the existence of such fact.

Second. That all facts which may be contained in an official record, but which are not required to be ascertained and recorded by the official making such record, will be disregarded by the courts when offered to prove such facts, although such records may be received for other purposes.

Applying these principles to the case at bar, we frankly admit that the certified copy of the record in the Auditor's Office of the Post-Office Department of the account of C. C. McCoy as failing contractor, showing the amount of actual damage to the United States, *unaided* by other testimony, was legally insufficient to make out a *prima facie* case. While this certificate contains a recital to the effect that C. C. McCoy was a failing contractor, there is nothing in the law making it the duty of the Auditor for the Post-Office Department to ascertain and determine such fact, nor is it a matter necessarily connected with the duties of his office. The Auditor in making up this account necessarily relied upon information furnished to him through the proper official channels of the Post-Office Department, and it was unnecessary that his statement should show the facts necessary to prove that McCoy was in fact a fail-

ing contractor. We therefore again assert that we rely upon the telegrams from the postmaster at San Francisco to the Postmaster-General (record, pp. 48 and 49), and the official record of the Postmaster-General (record, p. 50), reporting and recording such fact as the only evidence in the case which can properly be regarded as competent to establish the fact that McCoy was a failing contractor.

Neither the circuit court of appeals nor the trial court seems to have noticed the provisions of section 3849, Revised Statutes, making it the duty of the postmaster at San Francisco not only to ascertain but to report this failure on the part of the contractor. They evidently proceeded upon the theory that these telegrams were mere hearsay testimony and not entitled to any weight as evidence of the fact they purported to report. And while it is true that a letter or telegram from the postmaster at San Francisco to the Postmaster-General relating some fact which it was not his official duty to report would be mere hearsay, yet our position is that because the particular fact reported not only came to the postmaster's knowledge in his official capacity, but in addition thereto it was made his duty by statute to ascertain and report such fact, that by reason of that statute and the requirements of his office such report was no longer mere hearsay, but became competent evidence of the fact therein reported.

III.

The Postmaster-General having in effect nullified the contract, for repeated failures on the part of McCoy, under an express provision in the contract authorizing such action, it was unnecessary to prove in an action for damages sustained by the Government, the substantive fact that McCoy had committed a breach of the contract by reason of his failure to perform the services required.

The contract between McCoy and the Government contained certain provisions which were evidently not considered by the circuit court or the circuit court of appeals in rendering their opinions in this case. These stipulations are as follows (record, p. 45):

> And it is further stipulated and agreed that the Postmaster-General *may annul this contract for repeated failures;* for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely performed, the revenues collected, or the laws maintained.
>
> And it is further stipulated and agreed *that such annulment shall not impair the right of the*

United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, *be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.*

The act of Congress of June 8, 1872, chapter 335, sections 245, 247, as amended by the acts of 1874 and 1876, provide, among other things, as follows:

> And in case of the failure of any bidder to enter into such contract to perform the service, or having executed a contract, *in case of failure to perform the service according to his contract*, he and his sureties shall be liable for the amount of said bond as liquidated damages to be recovered in an action of debt on said bond.

This suit is expressly authorized by that statute, and the contract provides that the Postmaster-General *may annul it for repeated failures.* This provision necessarily authorized the Postmaster-General *to determine the fact that there had been repeated failures to perform*, in which event he was authorized to annul the contract and make a temporary contract for carrying the mail upon such route. This is just what the Postmaster-General did in this case, and the records of the Post-Office Department introduced in evidence clearly establish such facts. The contract then provides *that such annulment shall not impair the right of the United States to claim damages from the contractor and his sureties under the contract, and*

that such damages may for the purpose of set-off or counterclaim, etc., * * * *be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.* The United States in this suit claims damages against said contractor and his sureties, and such damages have been *assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.* These facts are clearly established by the records introduced by the Government upon the trial of this case, and are sufficient under the peculiar provisions of the contract to entitle the United States to a judgment in its favor.

The certified copies of the records from the Post-Office Department certainly established the fact that the Postmaster-General, in effect, *annulled this contract for repeated failures.* The official information which was conveyed to him in the telegrams from the postmaster at San Francisco was sufficient to warrant the Postmaster-General in annulling the contract and employing other persons to perform the services which McCoy had agreed to perform. And inasmuch as the contract contained the express stipulation that "such annullment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract * * * to be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department," it would seem that in order to recover in an action for damages that it would only be necessary to allege and prove; **first**, that the Postmaster-General had, in effect, annulled the contract on account of repeated failures; and **second**, that the damages

claimed by the United States were assessed and liquidated by the Auditor of the Treasury for the Post-Office Department, as provided for in the contract.

We maintain that these two facts were not only properly pleaded but that certified copies of the records of the Post-Office Department introduced upon the trial sufficiently established such facts and in the absence of any evidence to the contrary, that the United States was entitled to a judgment in its favor.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

○